IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

(MOROGORO SUB-REGISTRY)

AT MOROGORO

LABOUR REVISION APPLICATION NO. 11 OF 2022

(ORIGINATING FROM LABOUR DISPUTE NO. CMA/MOR/01/2022)

ALLIANCE ONE TOBACCO TANZANIA LIMITED.....APPLICANT

VERSUS

WILLIAM ELLIOT PHIRI.....RESPONDENT

RULING

18th Oct, & 23rd Febr, 2024

M.J. Chaba, J.

The Respondent, William Elliot Phiri, was an employee of Alliance One Tobacco Tanzania Limited (The Employer), who is the Applicant herein. He was employed on 04th May, 2020 as the Processing Coordinator, and his salary was TZS. 2,558,608.49. He was terminated on 08th December, 2021 on grounds of misconduct namely, attempting to steal the Employer's property. It was alleged by the Employer that, the respondent herein had attempted to steal Lamina / Refeed, the Employer's property whose value was USD. 7,356.8. In their evidence, Sabatho Musombwa (DW1), Jimmy Mollel (DW2) and Yusuph Twaha (DW3) each stated that, the respondent

had loaded the Lamina / Refeed on the Tata Truck, and was about to pass the gate when he was apprehended by the Gateman. When they stopped him and checked the Truck, which was used for carrying the waste, they found the Lamina / Refeed packed on the Truck. When he was confronted by the watchman, the respondent admitted that he was trying to steal the said Lamina / Refeed, and begged to be forgiven. The confession was recorded on the flash disc and the flash disc was tendered before the CMA and admitted as Exhibit DD10. The respondent also admitted to have committed the attempted theft of the Employer's property through his own letter, which was admitted as Exhibit DD4. Following the incident, the Employer terminated the respondent's employment on 8th December, 2021.

Dissatisfied by the termination, the respondent (applicant at trial) filed a claim at the Commission for Mediation and Arbitration (the CMA) claiming that it was unfair termination both substantively and procedurally.

At the culmination of full trial, the CMA ruled out in his favour henceforth, he was awarded a total pay to the tune of TZS. 28,481,014/= categorised as hereunder:

1. A compensation of 12 months' salaries to a total of TZS. 27,103,301.9; and
2. A severance pay of TZS. 1,377,712.26.

Following the CMA's decision, the applicant (respondent at trial) was aggrieved by the Award of the CMA, hence this application for revision. The matter was disposed of by way of written submissions and each party dully complied with the Court's scheduled order. The applicant's submission was drawn and filed by Mr. Boniface Evans Woiso learned advocate from C & F Law Advocates based in Dar Es Salaam, while respondent's submission was drawn and filed by Mr. Anord E. Peter, also learned advocate from Charliano Attorneys based in Dar Es Salaam.

Arguing in support of revision application, the applicant's counsel submitted that, the testimonies of DW1, DW2 and DW3 and the documentary evidence tendered by the applicant before the CMA proves that the respondent was fairly terminated. He averred that, the offences the respondent was charged with and found guilty were within his job descriptions, that is; he was attempting to steal the Employer's property, and he admitted the commission of the offence. He contended that, under section 62 (1) of the Evidence Act [CAP. 6 R.E. 2022], the evidence of DW1 and DW2 was credible and trustworthy.

The learned advocate submitted further that, according to the letter of appointment received by the CMA as Exhibit DD1, Processing Coordinator, the employee was required to be honest and according

to Rule H and V of the Applicant's Disciplinary Code and Code of Business of Conduct the respondent herein was guilty of misappropriation of Company's property and the offence of being dishonest for attempting to steal the Employer's property, which amounts to termination.

The learned counsel further averred that, the Arbitrator analysed all these aspects and had reached into a conclusion that it is true that, the respondent committed the offence, but the offence committed is so trivial, and that the respondent should have been given a warning, and not termination.

In response, the Counsel for the respondent, Mr. Arnold Peter argued that, Section 37 (2) of the Employment and Labour Relations Act, [CAP. 366 R.E. 2019], articulates that, the Employer is required to lead evidence to prove that the reasons for termination was fair, otherwise the termination of employment would be held as unfair. The counsel argues that, the onus of proof is shouldered on the Employer under Rule 9 (3) of the Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007. The counsel also argues that, the Employer failed to prove before the CMA that, the reason for termination was fair. That, the Employer failed to call the key witnesses, the Driver and the Forklift Operator, who would have proved that indeed the respondent herein committed the alleged

offence. He continued to argue that, the respondent never admitted to have committed the offence, and that Exhibit DD6, the Minutes of the Disciplinary Proceedings is not a proof that, the respondent had admitted the commission of the offence. He also argues that, since the respondent was not charged with gross dishonest, the punishment for such misconduct is not termination.

The respondent's counsel also faulted the procedures undertaken during the disciplinary hearing, and that the Employer acted contrary to the provisions of Rule 13 of the Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007. That, the respondent was never furnished with the Investigation Report before the Disciplinary Hearing, and he was not given the Investigation Report when the matter was before the CMA. On this, he relied upon the decision in the case of **Tanzania Revenue Authority Vs. Andrew Mapunda (2015) 1 DSM Labour Revision No. 104 of 2014**.

He also alleges that, the respondent was not served with the formal charge sheet detailing the allegations levelled against him, thus he could not get prepared for his defence and that exhibit DD5 which was a Notice to attend the hearing did not have the details or charge which could have showed the allegations levelled against him. To buttress his argument, the counsel relied on the case of **Jimson**

Security Service Vs. Joseph Mdelega, IRI - Civil Application No. 152 of 2019, where it was held that:

> *"The disciplinary proceedings were flawed since the respondent was not served with any formal charge detailing the allegations levelled against him".*

He further contended that, the Disciplinary Hearing was chaired by the staff of the same rank as the respondent, both being coordinators, which is contrary to Rule 13 of GN No. 42 of 2007, and that the minutes of the Disciplinary Hearing did not give the details of the witnesses who testified during the hearing, and that the respondent was not given a chance to be heard during the Disciplinary Hearing.

The counsel argues that, parties were not given the opportunity to avail mitigation and aggravating factors and the Minutes (Exhibit DD6) does not show this important section contrary to Rule 13 GN. NO. 42 of 2007. To reinforce his argument, he cited the case of **Rajabu Malenda Vs. Security Group (T) Limited, (2015) 52 DSM, Lab Rev. No. 188 of 2015.** He also alleged that, the respondent was not given the chance to appeal as the same day after the hearing by the disciplinary committee, the respondent was given a termination letter.

Finally, Arnold Peter, counsel for the respondent argues that, the award was fair and justifiable because it contains evidence of both parties and the arbitrator decided basing on law and not on his personal view.

To rejoin, Mr. Boniface Woiso counsel for the applicant at first addressed the two new issues raised by the respondent as hereunder.

On issue one; the counsel says, the list of all participants is reflected in the attendance sheet and hearing form, and that it is not a legal requirement that every Disciplinary Hearing needs to be chaired by a person of a higher rank. According to him, what the law requires is, for an employee to be assisted by either a trade union representative or fellow employee during the hearing.

As to the issue of mitigation, the counsel argues that, there is nowhere it is shown in the records that the respondent complained of being denied a right to mitigate. The issue was raised by the commission *suo moto* without taking into consideration the testimonies of DW1 and DW2 respectively.

It is the counsel's submission that, the basic principles of natural justice were adhered to and therefore the applicant complied with the basic procedures and fair hearing. The counsel finally prayed for this Court to find merit in this revision application and proceed to quash and set aside the award as prayed.

From the records, and the arguments raised by both learned counsels, I find three pertinent issues to be resolved under the circumstance.

(1) Whether the respondent was fairly terminated.

(2) Whether the procedures for termination were lawfully.

(3) If not, whether the relief(s) awarded were fair and justifiable.

Looking at the relevant laws, I agree with both learned counsels that according to section 37 (2) (b) (i) (ii) and (c) of the Employment and Labour Relation Act (supra), for a reason for termination to be fair it must be related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the Employer and that, the termination must be in accordance with a fair procedure.

There is no doubt that, the offence levelled against the respondent (applicant at trial) is basically related to misconduct. However, it is the respondent's counsel argument that the charge was not proved and that he was not served with the charge detailing the allegations levelled against him.

As to whether the offence was committed, this fact was acknowledged by the Arbitrator in his Judgement, that taking reference to Exhibit DD10, the Flash Disc which recorded the

respondent's confession, DD11, the Incident Report, and DD13, and DD4, the statements of the respondent admitting to have committed the offence and the evidence of DW2 and DW3, he was of the settled view that, the offence was committed. I subscribe to the position of the Arbitrator that, indeed there was proof by the Employer that the offence was committed and it was committed by the respondent, William Elliot Phiri.

To be precise, there was evidence produced by the Employer at the CMA that, on 25th November, 2021 around 23.40 hours, a truck with registration no. T737 DUF being driven by Athumani Mnyukwa was stopped at the Gate, the truck was searched and it was found loaded with 8 boxes of LAMINA tobacco. The driver mentioned the respondent herein as the perpetrator of theft, and the driver and the respondent were taken to the security office for interrogations, where the respondent confessed to have committed the said offence and his confession was recorded. The recorded confession, and the written confession were both received at the CMA as proof of the commission of the offence by the respondent.

With the above pieces of evidence, it is, therefore, correct to find that, since DW1 and DW3 were present and their evidence being accepted by the CMA, and since there was a flash disc and statements of the respondent having admitted to have committed the offence, the

evidence not being hearsay, in my considered view, proved the offence. Section 143 of Evidence Act, [CAP. 6 R.E 2022] says:

> *"Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact".*

The above provision of the law has been interpreted by this Court and the Apex Court of our Land in number of decisions including the cases of **Yohanis Msigwa Vs. Republic [1990] TLR 148; Goodluck Kyando Vs. Republic [2006] TLR 363** and **Mtaki s/o Malima Vs. Republic, Criminal Appeal No. 119 of 2020 HC Musoma registry.** In the latter case of **Mtaki s/o Malima,** it was held that, the number of witnesses does not matter in proving any fact but the quality or credibility of the witness.

It is true that, number of witnesses do not matter. However, it should be noted that, where the quality and credibility of such testimony or testimonies is at issue, corroboration is inevitable. However, in this case the evidence of the Employer's witnesses which was corroborated by the physical and documentary evidence, sufficed to prove that the respondent committed the offence charged. It is therefore from this reasoning that, the Arbitrator did not even require further or more witnesses to prove the fact that, the offence was

committed and so he did not require the evidence of the Driver or the Forklift Operator being material witnesses, as the offence was already proved to have been committed by the material evidence supplied by the Employer to the CMA.

Rule 13 (1) of the Employment and Labour Relation (Code of Good Practice) GN No. 42 of 2007 require the Employer to investigate to ascertain whether there are grounds for a hearing to be conducted.

It is the argument and position by the applicant's counsel that, not every case requires investigation to be conducted. In fact, I too subscribe to his argument. But case laws have held that, where investigation is not a necessity, justifiable reasons must be supplied. By taking reference to the cases cited by the applicant, **Tatu S. Hamis and Aisha B. Ramadhani Vs. A3 Institute of Professional Studies, Revision No. 308 of 2019, HC,** and **Mantra Tanzania Limited Vs. Daniel Kisoka, Revision Application No. 267 of 2019,** the Courts of law having departed from the requirement of rule 13 (1), justifiable reasons were supplied according to the circumstances of the case.

The case at hand is totally distinguishable from the cited cases. To establish a valid reason for termination, investigation is very vital. And as said, the investigation depends on the circumstances of the case. In the case of **Tatu S. Hamis and Aisha B. Ramadhani**

(supra) investigation was not vital as the matter involved insubordination. There was tangible evidence that, the applicants refused to act on the lawful instructions of their supervisor hence making investigation unnecessary. In the instant case, investigation was vital, but this was done. There was an internal investigation report carried out by the Risk Assessment Department of the Employer, which had found the employee guilty of misconduct. Misconduct as per Rule 12 of GN. No. 42 of 2017 is the reason for Fair Termination. However, the question is whether the procedures under Rule 13 (4) of GN No. 42 f 2007 was complied with by the Employer. This sub rule 4 of Rule 13 reads:

> *"Rule 13 (4) - the hearing shall be heard and finalized within a reasonable time and chaired by a sufficiently senior management representative who shall not have been involved in the circumstances giving rise to the case.*

On reviewing the records, I noticed that there is (was) evidence that the respondent was served with the charge sheet, and he was given reasonable time to prepare for the hearing, and he had written his defense and served onto the employer. Then there was an investigation and a report was tendered as exhibit before the CMA.

Thus, there was proof that, the investigation was done. Now, the issue to be decided is whether failure to furnish the respondent with the investigation report amounts to unfair procedure for termination of employment.

Rule 13 of the Labour Relations (Code of Good Practice) (supra) was not violated as the respondent was afforded a chance to be heard, and there was no unfairness in the procedures taken for termination of the respondent's employment. The issue as to whether or not the respondent was supplied with the investigation report, was raised by the respondent in this appeal but it is not disputed that the employee was served with a show cause notice but he was not served with a copy of the enquiry report or investigation report. The hearing committee, however, relying on the confession made by the employee in his answers to a show cause notice and also upon consideration of the materials on record, recommended a punishment of removal from the employment as the employee does not deserve to continue with the employment for misconduct.

During the hearing before the Disciplinary Committee, no plea was raised by the respondent that, he was prejudiced in any manner either by reason of non-supply of the said investigation report to him or that he was given little time to find the representative or non-grant of an opportunity of hearing to him. It is to be noted that, discipline

and decency at work place on the part of the employee must be maintained at all costs and breach thereof will have to be severely dealt with.

Further, the employee was given an opportunity to be heard and to have a representation. It is not a case where failure to supply him with the investigation report caused any prejudice to the respondent at the Disciplinary hearing committee as all witnesses were available to prove the charges against him; the witnesses were fully cross-examined and the respondent fully fended for himself before the Committee.

So far as non-furnishing of copy of the enquiry / investigation report is concerned, having regard to the decision of this Court in the case of T**anzania Telecommunication Vs. Nkayira Moshi, High Court, Labour Division, Arusha (2016)**, the question to be determined is this; was the employer required under the law to furnish a copy of the enquiry or investigation report to the employee (respondent) before the hearing of the matter by the Disciplinary Committee? The answer is not far-fetched. Section 13 (1) and (2) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 requires an employer to conduct an investigation to ascertain whether there are grounds for a hearing to be held, this Section provides:

"Rule 13 (1) - The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.

(2) Where a hearing is to be held, the employer shall notify the employee of the allegations using a form and language that the employee can reasonably understand".

The employer is not required to give an investigation report but to conduct an investigation before hearing. Compliance of principles of natural justice not only varies from case to case, but also depends to the circumstances of each case. In a situation of the present nature, the same would be deemed to have been waived as by reason of non-issuance of a show cause notice upon the respondent by the Employer, but by not being supplied with the investigation report, the employee was not at all prejudiced as he himself had confessed before the Disciplinary Hearing Committee to have committed the offence while he was still under the employment of the applicant thereby amounting to misconduct whose punishment is termination.

Further, the validity of the disciplinary proceeding and/or justifiability thereof on the ground of failure to supply him with the investigation report or otherwise, had never been raised by the

respondent before any forum but in his reply submissions. It was not his case either before the disciplinary hearing committee or CMA that by reason of failure to be supplied with the investigation report he had been prejudiced in any manner whatsoever.

Thus, the failure to supply the employee with an investigation report would not vitiate the disciplinary proceedings unless the failure resulted in prejudice or injustices to the respondent. In this case, such injustices or a prejudice has not arisen. Additionally, there was no material placed by the employee to show as to how he has been prejudiced.

From the above discussion, I am settled in my mind that, the principles of natural justice were complied with by the Employer and the Disciplinary Committee as well. The Arbitrator was also required to apply his mind to the materials on records. The fact that, the respondent did not file any objection to the show cause notice, there has been no violation of Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 and no violation of principles of natural justice in as much as the show cause notice was accordingly issued to the respondent. It is on records that, he answered the allegations, he was given a notice to attend the hearing, he had time to find and discuss the matter with his representative,

and he also had a chance to cross-examine the witnesses during the hearing.

The contention that, a copy of the enquiry report was not furnished to the respondent by the Employer before the hearing and that there has been a violation of the mandatory provisions of the regulations cannot also be accepted for the reasons stated hereinabove.

Again, under Rule 13 (7) of the GN. No. 42 of 2007 (supra), mitigation is a mandatory requirement, but the offence committed attracted no more than the termination. It is evident from the Applicant's Code of Conduct (Exhibit DD9) that, once the offence of dishonesty is established, the punishment provided therein is termination from the employment.

There was no procedural irregularity on appeal. The respondent was afforded a chance to be heard, and he was informed his right to appeal,however he chose not to appeal but to file a claim before the CMA.

In the event, I am satisfied that, under the circumstances, the Arbitrator's Award was improperly procured in that, the Award contained material irregularities and errors for failure to properly evaluate the evidence presented before it. The termination of the respondent was substantially and procedurally fair. Henceforth this

Labour Revision Application No. 11 of 2023 is allowed, and the Awards of the Arbitrator in Labour Dispute No. CMA/MOR/01/2022 dated 17th day of May, 2023 is hereby revised, quashed and set aside. As the matter before me involves Labour Dispute, I thus order that each party shall bear its own costs. Order accordingly.

DATED at MOROGORO this 23rd day of January, 2024.

M. J. Chaba

JUDGE

23/02/2024

Court:

Ruling delivered at my hand and Seal of this Court in Chamber's this 23rd day of February, 2024 in the presence of the Mr. Boniface Owiso Learned Advocate for the Applicant, through Video Conference and in the absence of the Respondent.

S. P. KIHAWA

DEPUTY REGISTRAR

23/02/2024

Court:

Rights of the parties to appeal to the Court of Appeal of Tanzania fully explained.

S. P. KIHAWA

DEPUTY REGISTRAR

23/02/2024